

Michigan Coastal Zone Management Program

Routine Program Change Concurrence Request: Enforceable Policies for Environmental Protection Litigation

June 2, 2014

Introduction

The Michigan Coastal Zone Management Program (MCZMP), in the Office of the Great Lakes, Michigan Department of Environmental Quality, was approved by the National Oceanic and Atmospheric Administration (NOAA) in 1978, pursuant to Section 306 of the Federal Coastal Zone Management Act of 1972 (P.L. 109-58). The MCZMP, as approved, includes enforceable policies involving the management and protection of the Great Lakes coastal zone in Michigan that are contained in several State statutes and administrative rules. To keep the MCZMP current, it is occasionally necessary to update the description of those enforceable policies to reflect legislative amendments, rule revisions, and similar actions, and to seek NOAA's concurrence in the incorporation of such routine changes to the MCZMP as required under 15 CFR 923.84.

This document is a request by the State of Michigan for the concurrence of the Office of Ocean and Coastal Resource Management, NOAA, in the incorporation of the following Routine Program Change (RPC) to the MCZMP. The RPC addresses changes to certain Michigan policies for environmental protection litigation. Specifically, the policies are identified in the "State of Michigan Coastal Management Program and Final Environmental Impact Statement" submitted to the NOAA for review on May 19, 1978, and subsequently approved, as Act No. 127 of the Public Acts of 1970, Michigan Environmental Protection Act ("Act 127"). The policies in Act 127 were approved by the NOAA at the time the MCZMP was approved.

The provisions of Act 127 were incorporated into Michigan's environmental code, the Natural Resources and Environmental Protection Act, Public Act 451 of 1994, as amended (NREPA), in 1995. Today, the provisions are known as Part 17, (Michigan Environmental Protection Act), of NREPA, comprising sections 324.1701 to 324.1706 of the Michigan Compiled Laws. The NREPA is a statute created by the Michigan legislature and made into law through the legislative process. Neither Act 127 nor Part 17 provide for the promulgation of administrative rules.

Policies Background

The purpose of Part 17 is to protect the environment by authorizing civil lawsuits under certain circumstances. Specifically, it authorizes the attorney general or any person to bring actions for declaratory and equitable relief against any person whose conduct is causing or is likely to cause pollution, impairment, or destruction of air, water, or other natural resources or the public trust in those

resources. This Part authorizes citizen-initiated lawsuits and court review of standards; addresses payments of costs and surety bonds in such proceedings; governs evidentiary rules, affirmative defenses, and burdens of proof; authorizes courts to grant equitable relief; sets out procedures for considering environmental protection in licensing and other administrative actions; provides jurisdiction and standards for adjudication and judicial review; and allows intervention.

Analysis of Routine Program Change

The RPC analysis is based on a comparison of the provisions of Act 127 that were in effect on May 19, 1978, to the provisions of Part 17 in effect today (Attachment 1). In the comparison, all language in Act 127 that is not present in Part 17 appears in strike-through text. All language in Part 17 not present in Act 127 appears in underlined text. Where strike-through and/or underlined text indicates a noteworthy change, the change is categorized as substantive or non-substantive. Examples of substantive changes are:

- A practical change in what is required for the State or regulated community to comply with the statute;
- A change in the consequences of actions or inaction by the State or regulated community; or
- A change in the type or extent of opportunities for public involvement.

Statutory Changes

As described in Attachment 1, none of the changes from the provisions of Act 127 in effect on May 19, 1978 are substantive. Instead, they reflect the recodification of Act 127 into the NREPA, and various editorial, titling, and citation changes.

RPC Justification

The MCZMP has evaluated these changes pursuant to 15 CFR 923, Subpart H and concluded that the changes described here constitute a Routine Program Change. They do not constitute a Program Amendment as defined by 15 CFR 923.80(d) because they do not substantially change any of the five Coastal Zone Management Act Program areas. The changes do not add or remove uses subject to management. The MCZMP has chosen not to employ special management areas and the changes do not affect that decision. The changes do not revise the approved MCZMP boundary. The changes do not substantially affect the resource or the regulated community, or the authority for administration of the policies within the organization of State government. Finally, the changes do not affect coordination, public involvement, and the national interest.

ATTACHMENT 1

Comparison of the Provisions of Public Act 127 of 1970 to the Provisions of Part 17, Michigan Environmental Protection Act, of NREPA

Act 127 Provisions (in effect on May 19, 1978)	Current Part 17 Provisions (as last amended effective March 30, 1995)	Change
<p>691.1202 Action for relief, parties; standards, judicial action.</p> <p>Sec. 2.</p> <p>(1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.</p>	<p><u>324.1701 Actions for declaratory and equitable relief for environmental protection; parties; standards; judicial action.</u></p> <p>Sec. <u>1701.</u></p> <p>(1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust <u>in these resources</u> from pollution, impairment, or destruction.</p>	<p>Non-Substantive. Michigan environmental and natural resource laws are drawn from the Natural Resources and Environmental Protection Act (NREPA; 1994 P.A. 451, as amended), a variety of laws reorganized into a single unified code. 1970 P.A. 127 – Michigan Environmental Protection Act – was repealed and reenacted as Part 17 of NREPA effective March 30, 1995.</p> <p>Non-Substantive. Citation change and retitling.</p> <p>Non-Substantive. Renumbering.</p> <p>Non-Substantive. Definition of person is located at section 324.301(h) of NREPA: “Person” means an individual, partnership, corporation, association, governmental entity, or other legal entity.</p> <p>Non-Substantive. Editorial changes here and below. Section 324.107 of NREPA states in full, “It is the intention of the legislature that editorial changes in the language of the statutes codified as parts within this act not be construed as changes to the meanings of those statutes.”</p>

<p>(2) In granting relief provided by subsection (1) where there is involved a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:</p> <p>(a) Determine the validity, applicability and reasonableness of the standard.</p> <p>(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.</p> <p>691.1202a Plaintiff, surety bond.</p> <p>Sec. 2a.</p> <p>If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond or cash not to exceed \$500.00.</p> <p>691.1203 Evidence, rebuttal; affirmative defense; referee; costs.</p> <p>Sec. 3.</p> <p>(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also</p>	<p>(2) In granting relief provided by subsection (1), <u>if</u> there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by <u>the state or an instrumentality, agency, or political subdivision of the state</u>, the court may:</p> <p>(a) Determine the validity, applicability, and reasonableness of the standard.</p> <p>(b) <u>If</u> a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.</p> <p><u>324.1702</u> Payment of costs or judgment; posting surety bond or cash; amount.</p> <p>Sec. <u>1702</u>.</p> <p>If the court has reasonable grounds to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment <u>that</u> might be rendered against him <u>or her</u> in an action brought under this <u>part</u>, the court may order the plaintiff to post a surety bond or cash <u>in an amount of not more than</u> \$500.00.</p> <p><u>324.1703</u> Rebuttal evidence; affirmative defense; burden of proof; referee; costs.</p> <p>Sec. <u>1703</u>.</p> <p>(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has <u>polluted, impaired, or destroyed</u> or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust <u>in these resources</u>, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The</p>	<p>Non-substantive. Editorial changes.</p> <p>Non-substantive. Editorial changes.</p> <p>Non-substantive. Editorial changes.</p> <p>Non-substantive. Citation change and retitling.</p> <p>Non-Substantive. Renumbering. Non-substantive. Editorial changes.</p> <p>Non-Substantive. Citation change and retitling.</p> <p>Non-Substantive. Renumbering.</p> <p>Non-substantive. Editorial changes.</p>
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<p>show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act.</p> <p>(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his findings to the court in the action.</p> <p>(3) Costs may be apportioned to the parties if the interests of justice require.</p> <p>691.1204 Relief granted; administrative proceedings, remand; judicial review, jurisdiction.</p> <p>Sec. 4.</p> <p>(1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction.</p> <p>(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings, which proceedings</p>	<p>defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that <u>his or her</u> conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this <u>part</u>.</p> <p>(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his <u>or her</u> findings to the court in the action.</p> <p>(3) Costs may be apportioned to the parties if the interests of justice require.</p> <p><u>324.1704 Granting of relief; administrative, licensing, or other proceedings; adjudication; judicial review.</u></p> <p>Sec. <u>1704</u>.</p> <p>(1) The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust <u>in these resources</u> from pollution, impairment, or destruction.</p> <p>(2) If administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may <u>direct</u> the parties to <u>seek relief in</u> such proceedings. <u>Proceedings described</u></p>	<p>Non-substantive. Editorial changes.</p> <p>Non-substantive. Citation change and retitling.</p> <p>Non-Substantive. Renumbering.</p> <p>Non-substantive. Editorial changes.</p> <p>Non-Substantive. Editorial changes.</p>
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<p>shall be conducted in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.343 of the Compiled Laws of 1948. In so remitting the court may grant temporary equitable relief where necessary for the protection of the air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.</p> <p>(3) Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.</p> <p>(4) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, notwithstanding the provisions to the contrary of Act No. 306 of the Public Acts of 1969, pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.</p> <p>691.1205 Intervenor; determinations; doctrines applicable.</p> <p>Sec. 5.</p> <p>(1) Whenever administrative,</p>	<p><u>in this subsection shall be conducted in accordance with and subject to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. <u>If the court directs parties to seek relief as provided in this section,</u> the court may grant temporary equitable relief <u>if</u> necessary for the protection of the air, water, and other natural resources or the public trust <u>in these resources</u> from pollution, impairment, or destruction. <u>In addition,</u> the court retains jurisdiction of the action pending completion <u>of the action to determine</u> whether adequate protection from pollution, impairment, or destruction <u>is</u> afforded.</u></p> <p>(3) Upon completion of proceedings <u>described in this section,</u> the court shall adjudicate the impact of the defendant's conduct on the air, water, or other natural resources, and on the public trust <u>in these resources,</u> in accordance with this <u>part</u>. In <u>adjudicating an action,</u> the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this <u>part</u>.</p> <p>(4) <u>If judicial review of an administrative, licensing, or other proceeding is available, notwithstanding the contrary provisions of Act No. 306 of the Public Acts of 1969 pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.</u></p> <p><u>324.1705 Administrative, licensing, or other proceedings; intervenors; determinations; doctrines applicable.</u></p> <p>Sec. <u>1705.</u></p> <p>(1) <u>If</u> administrative, licensing, or other</p>	<p>Non-Substantive. Citation format change.</p> <p>Non-Substantive. Editorial changes.</p> <p>Non-substantive. Editorial changes.</p> <p>Non-substantive. Citation change and retitling.</p> <p>Non-Substantive. Renumbering.</p> <p>Non-Substantive. Editorial</p>
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<p>licensing or other proceedings, and judicial review thereof are available by law, the agency or the court may permit the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein.</p> <p>(2) In any such administrative, licensing or other proceedings, and in any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.</p> <p>(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.</p> <p>691.1206 Act supplementary.</p> <p>Sec. 6.</p> <p>This act shall be supplementary to existing administrative and regulatory procedures provided by law.</p>	<p>proceedings and judicial review <u>of such proceedings</u> are available by law, the agency or the court may permit the attorney general <u>or</u> any <u>other</u> person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct <u>that</u> has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust <u>in these resources</u>.</p> <p>(2) In administrative, licensing, or other proceedings, and in any judicial review <u>of such a proceeding</u>, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust <u>in these resources</u>, shall be determined, and conduct shall <u>not</u> be authorized or approved <u>that has</u> or is likely to have such <u>an</u> effect <u>if</u> there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.</p> <p>(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.</p> <p><u>324.1706 Part as supplement.</u></p> <p>Sec. <u>1706</u>.</p> <p>This <u>part is</u> supplementary to existing administrative and regulatory procedures provided by law.</p>	<p>changes.</p> <p>Non-substantive. Editorial changes.</p> <p>Non-substantive. Citation change and retitling. Non-Substantive. Renumbering. Non-substantive. Editorial changes.</p>
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